rise to a civil cause or to a criminal cause must in the last analysis depend upon its particular wording and upon the customary mode of enforcement of similar statutes in the particular jurisdiction.

EQUITABLE CONVERSION AS RELATING TO OPTIONS. — In the ordinary case of an absolute contract to buy and sell land, Equity, looking to substance rather than to form, as it is said, regards the purchaser as owner and the vendor as having merely a claim for money with the legal title as security. If both the vendor and the purchaser die intestate immediately after the contract is made the vendor leaves, in substance, a claim for money which would devolve to his personal representatives and his heirs would hold the legal title in trust for them.[1] The purchaser's rights, being realty in substance, devolve to his heirs.[2]

Where, however, the contract is enforceable only on motion of the purchaser, as, for example, where an option is given, the vendor, if he dies before it is exercised, would seem to leave to his heirs both the legal and the equitable title. He has no claim for the purchase price, and so leaves none to his personal representatives. It would seem best that the rights of the heir and the personal representatives of the vendor should be settled once and for all at the vendor's death.[3] A subsequent exercise of the option, with its consequent actual conversion of the land of the deceased into money, should not divest the heirs.[4] Such a rule would be harmonious with other cases of equitable conversion where rights once vested remain fixed despite subsequent changes in form.[5] It is not contrary to any expressed intention of the testator. It is easy of application and does not change the feudal classification of property by giving realty to the personal representatives. A possible objection is, that it leaves out of account the probable intention of the deceased. His exact intention is unexpressed, but it would be proper for a court to lay down a rule to carry out the probable intent in the greatest number of cases.[6] Thus in the case of an absolute contract the deceased vendor has manifested an intention to convert realty into personalty, and so by a test based upon intention, also, the personal representatives would

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STRUCTION OF STATUTORY AND CONSTITUTIONAL LAW, 2 ed., 77. But the extreme infrequency of the latter type would seem to show that the legislators attached no decisive meaning to words of prohibition.

[1] Bubb's Case, Freem. 38.

[2] Milner *v.* Mills, Moseley 123; Moore *v.* Burrows, 34 Barb. (N. Y.) 173. These conversions have been thought by some authorities to be fictitious and unnecessary. See Lysaught *v.* Edward, 2 Ch. D. 499, 519; LANGDELL, in 18 HARV. L. REV. 246. But it is so well established that it must be accepted.

[3] Curre *v.* Bawyer, 5 Beav. 6; Keep *v.* Miller, 42 N. J. Eq. 100; Leiper's Appeal, 35 Pa. St. 420.

[4] Smith *v.* Lowenstein, 50 Oh. 346. See Rockland-Rockport Lime Co. *v.* Leary, 203 N. Y. 469, 478, 97 N. E. 43, 45. Graves *v.* Graves, 15 Ir. Ch. 357, and *Re* Walker's Estate, 17 Jur. 706, although purporting to be consistent with Lawes *v.* Bennett, 1 Cox Ch. 167, distinguish it in a very unsatisfactory way.

[5] Curteis *v.* Wormwald, 10 Ch. D. 172; Ackroyd *v.* Smithson, 1 Bro. Ch. 503.

[6] See Rockland-Rockport Lime Co. *v.* Leary, 203 N. Y. 469, 481, 97 N. E. 43, 46; Mayer *v.* Gowland, 2 Dick. 563, 565; Weeding *v.* Weeding, 1 Johns. & H. 424, 430; LANGDELL, in 18 HARV. L. REV. 246.

be entitled. Also an option to sell, given by the deceased, manifests a desire to convert his property into personalty, whether or not the option is later exercised. Giving effect to such desire would entitle the personal representatives to land. If the option was never exercised, this would result in a clear violation of all principles of devolution, since realty would descend to the personal representatives. Moreover, the facts in each case would urge a modification of any set rule.[7] Yet this could not be allowed without violating the Wills Act.

The weight of authority on this point follows the leading case of Lawes v. Bennett,[8] and adopts a middle ground, differing from either of the solutions suggested.[9] If the option is not exercised, the heir takes and retains the land; but if the option is exercised, the heir gets the rents and profits until the exercise of the option and then the proceeds go to the personal representatives. A recent case is in accord with this view. *McCutcheon's Estate*, 61 Pitts. Leg. J. 315. So vacillating a rule has obvious objections. To have the ultimate ownership unsettled indefinitely, conceivably for generations, is impracticable and unjust.[10] Many cases that follow this rule, in deference to the great authority of Lord Kenyon, have doubted it on theory.[11] If the rule is founded on reason, it should be applied also in the cases where the purchaser waives the breach of a condition by the vendor; yet it is limited to cases of options.[12] Moreover, even in cases of options, the personal representatives take nothing if there be a specific devise instead of a general devise or intestacy.[13] This may be distinguished, however, since, if the devise be specific and made after the option is given, the testator has expressed an intention to benefit the devisee to that extent. This doctrine, then, involved in Lawes v. Bennett, has been limited to those facts regardless of similarity in principle.[14] Such exceptions are simply examples of limiting the application of a bad rule of law.

THE OWNERSHIP OF LAND UNDER WATERS. — While it is a well-recognized rule of law that land under navigable[1] waters belongs to the sovereign, and land under non-navigable waters to the riparian

[7] Thus, where the option is incidental to a long term or perpetual lease, the leasor can scarcely be said to have manifested an intention to convert. See Rockland-Rockport Lime Co. *v.* Leary, 203 N. Y. 469, 481, 97 N. E. 43, 46. Also, if an option is followed by a specific devise, a desire not to convert is shown.

[8] 1 Cox Ch. 167.

[9] Townley *v.* Bedwell, 14 Ves. Jr. 590; *In re* Isaacs, [1894] 3 Ch. 506.

[10] Smith *v.* Lowenstein, 50 Oh. 346. See Rockland-Rockport Lime Co. *v.* Leary, 203 N. Y. 469, 478, 97 N. E. 43, 45.

[11] See Townley *v.* Bedwell, 14 Ves. Jr. 591, 596; Collingwood *v.* Row, 3 Jur. N. S. 785, 786; Edwards *v.* West, 7 Ch. D. 858, 863; *In re* Walker's Estate, 17 Jur. 706.

[12] Thomas *v.* Howell, 34 Ch. D. 166.

[13] Drant *v.* Vause, 1 Y. & C. Ch. 580; Emuss *v.* Smith, 2 DeG. & Sm. 222; *In re* Pyle, [1895] 1 Ch. 724.

[14] Edwards *v.* West, 7 Ch. D. 858.

[1] The word "navigable" as a term of this rule of law is not necessarily bound up with actual navigability. It is merely a convenient technical term to signify the criterion for the sovereign's ownership of subaqueous land. When used in this technical sense it is often spoken of as "navigable in law." See Miller *v.* State, 124 Tenn. 293–300, 137 S. W. 760, 761; FARNHAM, WATERS, § 38.